

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) MAY 17, 2022
 RAMESH "SUNNY" BALWANI,)
) VOLUME 30
 DEFENDANT.)
) PAGES 5838 - 5871

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTERS:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074
LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: MOLLY MCCAFFERTY
SHAWN ESTRADA
JAMES FLYNN
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105

BY: JEFFREY COOPERSMITH
AARON BRECHER
AMANDA MCDOWELL
701 FIFTH AVENUE, SUITE 5600
SEATTLE, WASHINGTON 98104

BY: STEPHEN CAZARES
77 SOUTH FIGUEROA STREET, SUITE 3200
LOS ANGELES, CALIFORNIA 90017

BY: AMY WALSH
51 W 52ND STREET
NEW YORK, NEW YORK 10019

ALSO PRESENT:

OFFICE OF THE U.S. ATTORNEY
BY: MADDI WACHS, PARALEGAL
SARA SLATTERY, PARALEGAL

ORRICK, HERRINGTON & SUTCLIFFE
JENNIFER CYGNOR, PARALEGAL

PROLUMINA
BY: COREY ALLEN
CHRISTIAN TIEDEMANN
2200 SIXTH AVENUE, SUITE 425
SEATTLE, WASHINGTON 98121

UNITED STATES POSTAL INSPECTION SERVICE
BY: CHRISTOPHER MCCOLLOW

FEDERAL BUREAU OF INVESTIGATION
BY: MARIO C. SCUSSEL

UNITED STATES FOOD & DRUG
ADMINISTRATION
BY: GEORGE SCAVDIS

1 SAN JOSE, CALIFORNIA

MAY 17, 2022

2 P R O C E E D I N G S

09:25AM 3 (COURT CONVENED AT 9:25 A.M.)

09:26AM 4 (JURY IN AT 9:26 A.M.)

09:26AM 5 THE COURT: THANK YOU AGAIN FOR YOUR COURTESY AND
09:26AM 6 YOUR PATIENCE THIS MORNING.

09:26AM 7 WE ARE ON THE RECORD IN THE BALWANI MATTER, AND ALL
09:26AM 8 COUNSEL IS PRESENT.

09:26AM 9 MR. BALWANI IS PRESENT.

09:26AM 10 OUR JURORS ARE PRESENT, SAVE FOR ONE JUROR WHO, LADIES AND
09:26AM 11 GENTLEMEN, IS ILL AND COULDN'T JOIN US TODAY. I'VE HAD
09:26AM 12 OCCASION TO SPEAK WITH COUNSEL ABOUT THIS SITUATION.

09:26AM 13 WHAT WE'RE GOING TO DO IS TO -- I'M INFORMED THAT THE
09:26AM 14 JUROR WILL BE ABLE TO JOIN US TOMORROW. AND SO WHAT I'M GOING
09:26AM 15 TO DO, AFTER DISCUSSING WITH COUNSEL, WE'RE GOING TO ADJOURN
09:26AM 16 FOR TODAY AND RESUME THE TRIAL TOMORROW.

09:26AM 17 SO THE -- OUR JUROR WHO IS ILL WILL BE ABLE TO, I'M
09:26AM 18 INFORMED, WILL BE ABLE TO JOIN US TOMORROW FOR THE PROCEEDINGS.

09:26AM 19 SO WE'RE NOT GOING TO HAVE ANY PROCEEDINGS TODAY WITH YOUR
09:27AM 20 SERVICE.

09:27AM 21 I APOLOGIZE FOR THE INCONVENIENCE. I HOPE YOU JOIN ME IN
09:27AM 22 WISHING HIM WELL. AND HE'LL BE BACK TOMORROW I'M TOLD.

09:27AM 23 SO LET ME ASK YOU THAT QUESTION, THOUGH, YOU 11 HERE, IF
09:27AM 24 ANY OF YOU HAVE -- MY ADMONITION QUESTION, DID ANY OF YOU HAVE
09:27AM 25 CAUSE DURING THE BREAK TO READ, HEAR, OR LEARN ANYTHING ABOUT

09:27AM 1 THIS CASE OUTSIDE OF THE COURTROOM?

09:27AM 2 IF SO, PLEASE RAISE YOUR HANDS.

09:27AM 3 I SEE NO HANDS. THANK YOU VERY MUCH.

09:27AM 4 LET ME JUST ASK COUNSEL, COUNSEL, IS THERE ANY OBJECTION

09:27AM 5 TO THE COURT PROCEEDING THIS MORNING WITHOUT THE JUROR, OUR ILL

09:27AM 6 JUROR PRESENT FOR THE PURPOSE OF THIS PROCEEDING?

09:27AM 7 MR. SCHENK: NO, YOUR HONOR. THANK YOU.

09:27AM 8 MR. COOPERSMITH: NO, YOUR HONOR.

09:27AM 9 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

09:27AM 10 SO, LADIES AND GENTLEMEN, WE'LL ADJOURN FOR THE DAY. WE

09:27AM 11 WILL ENGAGE TRIAL TOMORROW. I APOLOGIZE FOR THE INCONVENIENCE.

09:28AM 12 THESE THINGS HAPPEN, AND I HOPE YOU APPRECIATE THAT. AND

09:28AM 13 WE'LL SEE YOU TOMORROW. HAVE A GOOD DAY.

09:28AM 14 PLEASE AGAIN, REMEMBER THE ADMONITION. CONTINUE TO DO

09:28AM 15 WHAT YOU'RE DOING, WHICH IS BEING FAITHFUL TO THAT ADMONITION

09:28AM 16 AND NOT LEARNING OR LISTENING, DISCUSSING, OR READING ANYTHING

09:28AM 17 ABOUT THIS CASE.

09:28AM 18 WE'LL SEE YOU TOMORROW. I'M TOLD WE'LL START PROMPTLY AT

09:28AM 19 9:00 A.M. TOMORROW.

09:28AM 20 SO HAVE A GOOD EVENING. WE'LL SEE YOU TOMORROW.

09:28AM 21 THANK YOU VERY MUCH.

09:28AM 22 (JURY OUT AT 9:28 A.M.)

09:28AM 23 THE COURT: ALL RIGHT. PLEASE BE SEATED. THANK

09:28AM 24 YOU.

09:28AM 25 THE RECORD SHOULD REFLECT THAT THE JURY HAS LEFT FOR THE

09:29AM 1 DAY.

09:29AM 2 I WANT TO JUST INDICATE ON THE RECORD THAT ALL COUNSEL ARE
09:29AM 3 PRESENT, THE DEFENDANT IS PRESENT. AGAIN, WE'RE OUTSIDE OF THE
09:29AM 4 PRESENCE OF THE JURY.

09:29AM 5 DID COUNSEL HAVE ANYTHING ELSE THAT THEY WANTED TO RAISE
09:29AM 6 TODAY? WAS THERE SOMETHING, MR. COOPERSMITH?

09:29AM 7 MR. COOPERSMITH: YES, YOUR HONOR. THERE'S A MOTION
09:29AM 8 THAT WE FILED -- I'M SORRY. SORRY, YOUR HONOR.

09:29AM 9 THERE'S A MOTION THAT WE FILED LAST NIGHT. I DON'T KNOW
09:29AM 10 WHAT THE GOVERNMENT'S POSITION IS ON IT YET. MAYBE THERE'S NO
09:29AM 11 ISSUE.

09:29AM 12 BUT IF THERE IS ONE, THEN MY COLLEAGUE, JAMES FLYNN, WHO
09:29AM 13 IS HERE TODAY FROM THE EAST COAST, WOULD ARGUE THAT.

09:29AM 14 THERE'S ALSO A COUPLE OF MATTERS TO TAKE UP WITH REGARD TO
09:29AM 15 ONE OF THE WITNESSES THAT WE SHOULD SEE TOMORROW, MS. --

09:30AM 16 PATIENT E.T., I THINK WE'LL CALL HER THAT.

09:30AM 17 AND IS THERE ANOTHER -- I THINK THAT MIGHT BE IT,
09:30AM 18 YOUR HONOR.

09:30AM 19 THE COURT: OKAY. ALL RIGHT.

09:30AM 20 AND THIS IS IN REGARDS TO DOCUMENT 1439, I BELIEVE IT IS,
09:30AM 21 THAT WAS FILED LAST NIGHT?

09:30AM 22 MR. COOPERSMITH: YES, YOUR HONOR.

09:30AM 23 THE COURT: AND IT'S IN RELATION TO THE ADMISSION OF
09:30AM 24 TRIAL EXHIBIT 20683?

09:30AM 25 MR. COOPERSMITH: 20683, YES, YOUR HONOR.

09:30AM 1 THE COURT: RIGHT.

09:30AM 2 MR. BOSTIC, HAVE YOU SEEN THIS?

09:30AM 3 MR. BOSTIC: I HAVE, YOUR HONOR. I DID NOT HAVE A
09:30AM 4 CHANCE TO REVIEW IT. LAST NIGHT IT WAS FILED LATE. BUT I
09:30AM 5 REVIEWED IT THIS MORNING.

09:30AM 6 I UNDERSTAND THAT THE DEFENSE IS SEEKING TO ADMIT A SINGLE
09:30AM 7 PAGE, PAGE 9, OF THAT TRIAL EXHIBIT.

09:30AM 8 THE GOVERNMENT HAS SOME 403 CONCERNS AND 702, 702 ADJACENT
09:30AM 9 CONCERNS WITH THIS.

09:30AM 10 BUT I, I DON'T HAVE MUCH MORE TO ADD BEYOND THAT.

09:31AM 11 THE COURT: OKAY.

09:31AM 12 MR. BOSTIC: I THINK THE DEFENSE IS ASKING THAT THE
09:31AM 13 JURY RELY ON THIS AS AN AUTHORITY ON HOW HIV TESTING IS TO BE
09:31AM 14 CONDUCTED, AND IT'S NOT CLEAR TO ME THAT THE JURY, THE JURY IS
09:31AM 15 EQUIPPED TO INTERPRET THE DOCUMENT, AND IT'S CERTAINLY NOT
09:31AM 16 CLEAR THAT THE WITNESS IS IN A POSITION TO COMMENT ON ITS
09:31AM 17 CONTENT.

09:31AM 18 SO THOSE ARE MY CONCERNS.

09:31AM 19 THE COURT: OKAY. THANK YOU.

09:31AM 20 GOOD MORNING.

09:31AM 21 MR. FLYNN: GOOD MORNING. MAY I REMOVE MY MASK?

09:31AM 22 THE COURT: YES.

09:31AM 23 MR. FLYNN: JAMES FLYNN FOR MR. BALWANI.

09:31AM 24 AS TO 702, THE DEFENSE DOESN'T INTEND TO ASK THE WITNESS
09:31AM 25 ANYTHING THAT WOULD REQUIRE EXPERT ANALYSIS OR OPINION. WE

09:31AM 1 INTEND TO ASK HER ABOUT THE CONTENTS OF THE DOCUMENTS, AS
09:31AM 2 YOUR HONOR HAS SEEN IN THE TRANSCRIPT OF THE HOLMES TRIAL.

09:31AM 3 SO WE DON'T THINK THERE IS 702 ISSUES WITH RESPECT TO
09:31AM 4 ASKING THIS WITNESS --

09:31AM 5 THE COURT: PARDON ME FOR INTERRUPTING, MR. FLYNN.

09:31AM 6 WHY DON'T YOU FRAME FOR US WHAT IT IS THAT YOUR TEAM WOULD
09:31AM 7 LIKE TO DO. TELL US WHAT THIS IS AND WHAT IT IS YOUR TEAM
09:31AM 8 WOULD LIKE TO DO.

09:32AM 9 MR. FLYNN: SURE, YOUR HONOR.

09:32AM 10 THIS IS THE CDC'S ALGORITHM FOR HIV TESTING. THE
09:32AM 11 GOVERNMENT INTENDS TO OFFER E.T.'S TEST RESULTS THAT SHOW FOUR
09:32AM 12 UNDIFFERENTIATED HIV ASSAY RESULTS, AND WE THINK THE JURY NEEDS
09:32AM 13 SOME MEANS FOR UNDERSTANDING WHAT THOSE FOUR TESTS WERE AND WHY
09:32AM 14 FOUR DIFFERENT TESTS WERE PERFORMED ON THAT SAMPLE.

09:32AM 15 THE COURT: AND WOULD YOU CALL A WITNESS THEN TO
09:32AM 16 EXPLAIN THAT?

09:32AM 17 MR. FLYNN: NO. WE WOULD OFFER THIS DOCUMENT
09:32AM 18 THROUGH E.T., AND THIS DOCUMENT EXPLAINS THOSE TESTS.

09:32AM 19 AS TO 403 --

09:32AM 20 THE COURT: LET ME, LET ME -- I BEG YOUR PARDON.

09:32AM 21 MR. FLYNN: YES.

09:32AM 22 THE COURT: AND WHAT IS THIS DOCUMENT?

09:32AM 23 MR. FLYNN: THIS IS PART OF THE CDC'S RECOMMENDATION
09:32AM 24 FOR HOW LABORATORIES SHOULD APPROACH HIV TESTING.

09:32AM 25 THE COURT: AND WHERE IS THIS DOCUMENT FOUND?

09:32AM 1 MR. FLYNN: THIS WAS ON THE CDC'S WEBSITE.

09:32AM 2 THE COURT: I THINK YOU ADVOCATE THAT IT'S A PUBLIC

09:32AM 3 RECORD.

09:32AM 4 MR. FLYNN: IT IS UNDER 803(8) .

09:32AM 5 THE COURT: OKAY. IS IT A PUBLIC RECORD?

09:32AM 6 MR. FLYNN: IT IS.

09:32AM 7 THE COURT: TELL ME WHY.

09:32AM 8 MR. FLYNN: IT IS A DOCUMENT THAT SETS OUT THE

09:32AM 9 OFFICE'S ACTIVITIES, THE INVESTIGATION THAT THEY PERFORMED INTO

09:32AM 10 HIV TESTING, AND IT'S FACTUAL FINDINGS AND RECOMMENDATIONS WITH

09:33AM 11 RESPECT TO THE HIV TESTING.

09:33AM 12 THE COURT: AND WHO PUBLISHES THIS DOCUMENT?

09:33AM 13 MR. FLYNN: THE CDC, THE CENTER FOR DISEASE CONTROL.

09:33AM 14 THE COURT: IS THAT A GOVERNMENT AGENCY?

09:33AM 15 MR. FLYNN: IT IS A GOVERNMENT AGENCY.

09:33AM 16 THE COURT: THANK YOU FOR ANSWERING THOSE QUESTIONS.

09:33AM 17 WHAT ELSE WOULD YOU LIKE ME TO KNOW?

09:33AM 18 MR. FLYNN: SURE.

09:33AM 19 AS TO CONFUSION, WE RESPECTFULLY SUBMIT THAT THE CONFUSION

09:33AM 20 ARISES FROM THESE TEST RESULTS THAT HAVE FOUR UNEXPLAINED

09:33AM 21 DIFFERENT ASSAYS.

09:33AM 22 AND THE JURY, AS WE ALL ARE, ARE FAMILIAR WITH THE PROCESS

09:33AM 23 OF GETTING A SCREENING TEST AND A CONFIRMATORY TEST. OVER THE

09:33AM 24 LAST TWO YEARS WE HAVE BECOME INTIMATELY FAMILIAR WITH THAT

09:33AM 25 CONCEPT.

09:33AM 1 WE THINK THE JURY COULD UNDERSTAND THIS IF GIVEN ONE PAGE
09:33AM 2 OF THIS EXHIBIT, AND SO WE DON'T THINK THAT IT INCREASES THE
09:33AM 3 CONFUSION. IN FACT, IT MITIGATES THE CONFUSION ARISING FROM
09:33AM 4 THE EVIDENCE THAT THE GOVERNMENT SEEKS TO OFFER.

09:33AM 5 THE COURT: WHO WOULD EXPLAIN THIS DOCUMENT THEN?
09:33AM 6 THE DOCUMENT COMES IN -- IF IT COMES IN AS A PUBLIC RECORD, AS
09:33AM 7 YOU SUGGEST, THEN WHAT DOES YOUR TEAM INTEND TO DO WITH IT IF
09:33AM 8 THE WITNESS, AS YOU CONCEDE, PERHAPS WILL NOT HAVE ANY
09:34AM 9 INFORMATION, KNOWLEDGE ABOUT ANYTHING ON THIS DOCUMENT, THEN
09:34AM 10 WHAT -- HOW DO YOU EXPLAIN IT AND WHAT IS THE RELEVANCE TO THE
09:34AM 11 JURY? AREN'T YOU ASKING THE JURY THEN TO LOOK AT THIS DOCUMENT
09:34AM 12 AND TO SOMEHOW OPINE WITHOUT PROFESSIONAL INFORMATION ABOUT
09:34AM 13 WHAT IT SAYS TO INTERPRET? HOW DO THEY DO THAT?

09:34AM 14 MR. FLYNN: WE THINK AT LEAST THIS WOULD GET THE
09:34AM 15 JURY ONE STEP CLOSER TO UNDERSTANDING WHAT IS DISPLAYED ON THE
09:34AM 16 RESULTS, RIGHT. THEY'RE NOT GOING TO UNDERSTAND THE RESULTS ON
09:34AM 17 THEIR OWN, AND SO THIS IS AT LEAST ONE TOOL TO GET THEM THERE.

09:34AM 18 WE THINK THE JURY COULD UNDERSTAND THIS LANGUAGE. WE
09:34AM 19 DON'T THINK IT'S IN SUCH COMPLEX LANGUAGE, TECHNICAL LANGUAGE
09:34AM 20 THAT THE JURY COULDN'T UNDERSTAND, ESPECIALLY GIVEN THEIR
09:34AM 21 COMMON EXPERIENCE.

09:34AM 22 THE COURT: SO THIS IS A ROSETTA STONE FOR THE
09:34AM 23 TESTING? IS THAT WHAT THIS IS?

09:34AM 24 MR. FLYNN: IT IS AT LEAST A GLOSSARY, IF YOU WILL,
09:34AM 25 FOR THE TEST RESULTS.

09:34AM 1 THE COURT: I SEE. AND YOU OPINE THAT THE JURY WILL
09:34AM 2 BE ABLE TO LOOK AT THIS DOCUMENT AND TELL US WHAT IT IS?

09:34AM 3 DO YOU HAVE IT?

09:34AM 4 MR. FLYNN: I DO, YOUR HONOR, YES.

09:35AM 5 THE COURT: LET'S TAKE A LOOK AT IT.

09:35AM 6 MR. FLYNN: (HANDING.)

09:35AM 7 THE COURT: DO YOU HAVE A COPY OF THIS, MR. BOSTIC?

09:35AM 8 MR. BOSTIC: I DO, YOUR HONOR. THANK YOU.

09:35AM 9 (PAUSE IN PROCEEDINGS.)

09:35AM 10 THE COURT: OKAY. SO. MR. FLYNN, THE JURY IS GOING
09:35AM 11 TO HAVE NO TROUBLE, IN PARAGRAPH 2, FOUR LINES DOWN, IN
09:35AM 12 INTERPRETING AND UNDERSTANDING THE FOLLOWING: REACTIVE RESULTS
09:35AM 13 ON THE INITIAL ANTIGEN/ANTIBODY COMBINATION IMMUNOASSAY AND THE
09:35AM 14 HIV-1/HIV-2 ANTIBODY DIFFERENTIATION IMMUNOASSAY SHOULD BE
09:36AM 15 INTERPRETED AS POSITIVE FOR HIV-1 ANTIBODIES, HIV-2 ANTIBODIES,
09:36AM 16 OR HIV ANTIBODIES UNDIFFERENTIATED.

09:36AM 17 MR. FLYNN: YOUR HONOR, WE THINK IT WILL TAKE THEM
09:36AM 18 AT LEAST ONE STEP FURTHER TO UNDERSTANDING THE TEST RESULTS
09:36AM 19 THAT THE GOVERNMENT IS ASKING THEM TO INTERPRET, AND THOSE TEST
09:36AM 20 RESULTS INCLUDE REACTIVE RESULTS ON THE INITIAL ANTIGEN,
09:36AM 21 ANTIBODY, COMBINATION IMMUNOASSAY.

09:36AM 22 AND SO THE JURY NEEDS SOME EXPLANATION FOR WHAT THAT MEANS
09:36AM 23 WHEN THE GOVERNMENT TELLS THEM THAT THERE WAS A REACTIVE
09:36AM 24 RESULT.

09:36AM 25 THE COURT: SO DOES THIS LANGUAGE -- IT'S TECHNICAL

09:36AM 1 LANGUAGE, ISN'T IT?

09:36AM 2 MR. FLYNN: IT IS SOMEWHAT TECHNICAL.

09:36AM 3 THE COURT: I'M CURIOUS IF IT GETS THEM CLOSER OR
09:36AM 4 TAKES THEM FURTHER AWAY FROM COMPREHENSION SUCH THAT 403 SHOULD
09:36AM 5 BE INVOKED.

09:36AM 6 MR. FLYNN: YOUR HONOR, I'M NOT SURE WHAT WOULD
09:36AM 7 ALLOW THEM TO UNDERSTAND THE RESULTS IN THE FIRST INSTANCE
09:36AM 8 WITHOUT SOME DEFINITION, ALBEIT TECHNICAL.

09:36AM 9 THE FLOW CHART ALSO HELPS FOR UNDERSTANDING HOW IT
09:36AM 10 PROCEEDED THROUGH THE TESTING.

09:36AM 11 I WOULD NOTE ALSO THAT THIS PROCESS WAS EXPLAINED TO
09:37AM 12 PATIENT E.T. BY THERANOS OVER THE PHONE, SO THERE MAY BE SOME
09:37AM 13 BASIS FOR HER UNDERSTANDING IT AS WELL WHEN ASKED ABOUT IT ON
09:37AM 14 THE STAND.

09:37AM 15 THE COURT: THANK YOU. SO WHAT -- SO IF THIS PAGE
09:37AM 16 COMES IN, IF IT IS ADMITTED, IT WILL BE DISPLAYED?

09:37AM 17 MR. FLYNN: YES.

09:37AM 18 THE COURT: THEN HOW DOES THIS INFORMATION GET
09:37AM 19 DISCUSSED THEN? THE PATIENT PERHAPS WILL. I DON'T KNOW.
09:37AM 20 MAYBE.

09:37AM 21 MR. FLYNN: SHE MAY OR SHE MAY NOT.

09:37AM 22 THE COURT: IF SHE DOESN'T?

09:37AM 23 MR. FLYNN: AT THE VERY LEAST WE'LL ASK HER ABOUT
09:37AM 24 THE CONTENT, AS THE HOLMES COUNSEL DID IN THE HOLMES TRIAL, AND
09:37AM 25 COUNSEL WILL BE ABLE TO ARGUE INFERENCES IF ADMITTED IN CLOSING

09:37AM 1 ARGUMENT. AND SO, FOR INSTANCE, WE CAN POINT TO THIS DOCUMENT
09:37AM 2 TO EXPLAIN THE RESULTS DEPICTED IN THE E.T. TEST RESULTS.

09:37AM 3 THE COURT: WITH NO TESTIMONY SPECIFICALLY ABOUT
09:37AM 4 WHAT IT ACTUALLY MEANS?

09:37AM 5 MR. FLYNN: BEYOND WHAT E.T. IS ABLE TO TESTIFY
09:37AM 6 HERSELF, THAT'S RIGHT, YOUR HONOR.

09:37AM 7 THE COURT: OKAY. THANK YOU.

09:37AM 8 GO AHEAD. YOU ANSWERED MY QUESTIONS.

09:38AM 9 WHAT ELSE WOULD YOU LIKE ME TO KNOW?

09:38AM 10 MR. FLYNN: SURE.

09:38AM 11 I THINK WITH RESPECT TO 702, THE ONE OTHER POINT I WOULD
09:38AM 12 MAKE IS THAT WE'RE ONLY ASKING THE WITNESS ABOUT HER
09:38AM 13 OBSERVATIONS BASED ON THE DOCUMENT. THE SUPREME COURT HAS SAID
09:38AM 14 THAT IS OBSERVATION EVIDENCE THAT CAN COME IN THROUGH A LAY
09:38AM 15 WITNESS. THAT'S CLARK VERSUS ARIZONA, 548 U.S. AT 757 TO -58.

09:38AM 16 AND THAT'S ALL I HAVE WITH RESPECT TO THOSE OBJECTIONS,
09:38AM 17 YOUR HONOR.

09:38AM 18 THE COURT: OKAY. THANK YOU.

09:38AM 19 MR. BOSTIC.

09:38AM 20 MR. BOSTIC: JUST BRIEFLY, YOUR HONOR.

09:38AM 21 SO, FIRST OF ALL, TO BE CLEAR, THE GOVERNMENT IS NOT
09:38AM 22 OBJECTING ON A HEARSAY BASIS OR AUTHENTICITY BASIS. I AGREE
09:38AM 23 WITH THE DEFENSE THAT THOSE CONDITIONS ARE SATISFIED.

09:38AM 24 BUT IF THE ARGUMENT IS THAT THIS DOCUMENT, THIS
09:38AM 25 COMPLICATED TECHNICAL DOCUMENT IS NECESSARY TO CURE CONFUSION

09:38AM 1 CREATED BY THE TEST RESULTS THEMSELVES, THAT'S WHERE I THINK I
09:38AM 2 PART WAYS WITH THE DEFENSE.

09:38AM 3 AND I'M LOOKING AT E.T.'S TEST RESULTS, AND THEY ARE QUITE
09:39AM 4 CLEAR, IN WHICH OF THE FOUR HIV RESULTS WERE REACTIVE AND WHICH
09:39AM 5 WERE NONREACTIVE AND NOT DETECTED.

09:39AM 6 AND, IN FACT, ON PAGE 3 OF THE LAB REPORT, FOR PATIENT
09:39AM 7 E.T., THERE'S A NOTE THAT SAYS HIV ANTIBODIES WERE NOT
09:39AM 8 CONFIRMED AND HIV RNA WAS NOT DEPICTED. NO LABORATORY EVIDENCE
09:39AM 9 OF HIV-1 INFECTION. FOLLOW-UP TESTING FOR HIV-2 SHOULD BE
09:39AM 10 PERFORMED IF CLINICALLY INDICATED.

09:39AM 11 I WOULD SAY THAT THAT LANGUAGE ACCOMPLISHES WHAT THE
09:39AM 12 DEFENSE IS TRYING TO ACCOMPLISH WITH THIS TECHNICAL DOCUMENT,
09:39AM 13 AND I THINK IN LIGHT OF THAT LANGUAGE, I'M NOT SURE THAT
09:39AM 14 THERE'S CONFUSION THAT NEEDS TO BE CURED.

09:39AM 15 BUT NOTHING TO ADD BEYOND THAT, YOUR HONOR.

09:39AM 16 THE COURT: OKAY. THANK YOU.

09:39AM 17 WELL, THAT'S A CONCERN THAT I HAVE. AS I SAID EARLIER,
09:39AM 18 DOESN'T THIS CREATE MORE CONFUSION FOR THE JURY?

09:39AM 19 MR. FLYNN: I DON'T THINK SO, YOUR HONOR. I THINK
09:39AM 20 IT INTRODUCES TWO IMPORTANT CONCEPTS THAT ARE NOT CONTAINED IN
09:39AM 21 THE TEST RESULTS REPORT THAT THE GOVERNMENT JUST REFERENCED.

09:40AM 22 FIRST, IT'S THAT THERE IS A PROCESS, A SEQUENCE OF TESTS
09:40AM 23 THAT ARE TAKEN, AND THAT THERANOS FOLLOWED THAT PROCESS RATHER
09:40AM 24 THAN JUST TESTING FOUR DIFFERENT TESTS ALL AT ONCE, WHICH COULD
09:40AM 25 BE THE INFERENCE TAKEN FROM PAGE 2 OF THIS REPORT.

09:40AM 1 AND SECOND, THAT IN THOSE SEQUENCES, THERE'S FIRST A
09:40AM 2 SCREENING TEST AND THEN A CONFIRMATORY TEST.

09:40AM 3 AND WE DON'T THINK THAT THE JURY CAN UNDERSTAND THAT BASED
09:40AM 4 JUST ON THIS TEST RESULT REPORT THAT IS EXHIBIT 5483.

09:40AM 5 I WOULD NOTE THAT THE GOVERNMENT HAS NOT INDICATED THAT
09:40AM 6 THEY INTEND TO CALL ANY DOCTORS TO EXPLAIN THE TEST RESULT, THE
09:40AM 7 TREATING PHYSICIAN.

09:40AM 8 SO WE THINK WITHOUT THIS CDC DOCUMENT, THE GOVERNMENT'S
09:40AM 9 EVIDENCE IS CONFUSING AND NEEDS SOME MITIGATION FOR THE JURY.

09:40AM 10 THE COURT: THANK YOU.

09:40AM 11 AND IN ARGUMENT YOU SAID YOUR COLLEAGUES WOULD BE ABLE TO
09:41AM 12 ARGUE, OR TURN TO THIS DOCUMENT AND MAKE SOME ARGUMENTS, BUT
09:41AM 13 THERE WON'T BE ANY TESTIMONY ABOUT THIS DOCUMENT.

09:41AM 14 MR. FLYNN: THAT'S RIGHT, JUST THE CONTENTS OF THE
09:41AM 15 DOCUMENT.

09:41AM 16 AND I IMAGINE THOSE ARGUMENTS WOULD FOLLOW THE STATEMENTS
09:41AM 17 THAT I JUST MADE ABOUT THAT THERANOS FOLLOWED THE CDC PROCESS
09:41AM 18 AS REFLECTED IN THIS FLOW CHART, THAT THERE WAS A SCREENER AND
09:41AM 19 A CONFIRMATORY TEST, WHICH IS NOT SOMETHING THAT IS REFLECTED
09:41AM 20 IN JUST THE TEST RESULT 5483.

09:41AM 21 THE COURT: WELL, MR. BOSTIC SUGGESTS, I THINK WITH
09:41AM 22 SOME ACCURACY, THAT WE CAN ALREADY DO THAT JUST BASED ON HER
09:41AM 23 TEST.

09:41AM 24 MR. FLYNN: BASED ON HER TEST?

09:41AM 25 THE COURT: YES, AND RESULTS.

09:41AM 1 MR. FLYNN: I DON'T THINK THOSE TWO FACTS ARE
09:41AM 2 REFLECTED IN THE REPORT. I DON'T THINK THERE'S ANYTHING IN
09:41AM 3 5483 THAT EXPLAINS THE SCREENER VERSUS CONFIRMATORY NATURE OF
09:41AM 4 THOSE TWO TESTS OR THE FACT THAT THEY'RE TESTED IN SEQUENCE AS
09:41AM 5 OPPOSED TO IN ONE BATCH AS MIGHT BE SUGGESTED BY PAGE 2 OF THE
09:41AM 6 REPORT.

09:41AM 7 THE COURT: ALL RIGHT. THANK YOU.

09:41AM 8 ANYTHING FURTHER, MR. BOSTIC?

09:41AM 9 MR. BOSTIC: IF THAT'S THE CASE, THEN HOW IS THE
09:41AM 10 JURY TO CONCLUDE THAT THERANOS FOLLOWED THE SEQUENCE OR
09:42AM 11 PROCEDURE LAID OUT IN THE CDC DOCUMENT?

09:42AM 12 MR. FLYNN: YOUR HONOR, BECAUSE THOSE TESTS ARE
09:42AM 13 LISTED ON PAGE 2 OF THE DOCUMENT, AND THAT'S A REASONABLE
09:42AM 14 INFERENCE THAT THE JURY COULD MAKE BASED ON THE COMBINATION OF
09:42AM 15 THESE TWO EXHIBITS, AND COUNSEL FOR THE DEFENSE COULD MAKE THAT
09:42AM 16 ARGUMENT FOR THAT INFERENCE.

09:42AM 17 THE COURT: I'M SORRY, PAGE 2 OF THE DOCUMENT?

09:42AM 18 MR. FLYNN: PAGE 2 OF THE TEST RESULT INDICATES THE
09:42AM 19 FOUR TESTS THAT WERE PERFORMED.

09:42AM 20 WE THINK A COMBINATION OF THAT EVIDENCE AND PAGE 9 OF
09:42AM 21 20683 COUNSEL CAN MAKE A REFERENCE INFERENCE ARGUMENT AND THE
09:42AM 22 JURY COULD TAKE THAT INFERENCE.

09:42AM 23 THE COURT: OKAY.

09:42AM 24 ANYTHING FURTHER?

09:42AM 25 MR. BOSTIC: NO. SUBMIT IT, YOUR HONOR.

09:42AM 1 THE COURT: MR. FLYNN?

09:42AM 2 MR. FLYNN: THANK YOU VERY MUCH.

09:42AM 3 THE COURT: ANYTHING FURTHER?

09:42AM 4 MR. FLYNN: NO. THANK YOU.

09:42AM 5 THE COURT: ALL RIGHT. THANK YOU FOR THIS AND THE

09:42AM 6 CONVERSATION.

09:42AM 7 IF THE DEFENSE CHOOSES TO ADVANCE THIS FOR ADMISSION, THE

09:43AM 8 COURT, OVER THE GOVERNMENT'S OBJECTION, WOULD PERMIT IT. FOR

09:43AM 9 THE REASONS STATED BY THE DEFENSE, I'LL PERMIT IT. AND I'LL

09:43AM 10 NOTE THOSE REASONS ONLY.

09:43AM 11 MR. BOSTIC: UNDERSTOOD.

09:43AM 12 THE COURT: ALL RIGHT. THANK YOU.

09:43AM 13 WHAT'S NEXT?

09:43AM 14 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

09:43AM 15 I FEEL LIKE A MASTER OF CEREMONIES HERE. I APPRECIATE THE

09:43AM 16 TIME.

09:43AM 17 THERE'S JUST A COUPLE OF NOTABLY SMALL ISSUES WITH THE

09:43AM 18 SAME WITNESS, PATIENT E.T., DIFFERENT FROM WHAT YOU JUST HEARD.

09:43AM 19 SO THE FIRST ISSUE IS THAT THERE'S AN EXHIBIT THAT THE

09:43AM 20 GOVERNMENT WISHES TO ADMIT, AS I UNDERSTAND IT, AND IT'S

09:43AM 21 EXHIBIT 5484.

09:43AM 22 AND I'M TRYING TO UNDERSTAND THE BEST WAY TO GIVE THAT TO

09:43AM 23 YOUR HONOR. I DON'T THINK I HAVE ANOTHER COPY, BUT MAYBE WE

09:43AM 24 CAN DISPLAY IT ON THE SCREEN, OR I SUPPOSE I COULD HAND UP MY

09:43AM 25 COPY.

09:44AM 1 DO WE HAVE ANOTHER COPY?

09:44AM 2 THE COURT: WE'RE GETTING ONE. I THINK THE
09:44AM 3 GOVERNMENT IS GOING TO PROVIDE A COPY.

09:44AM 4 MR. COOPERSMITH: VERY HELPFUL, YOUR HONOR. THANK
09:44AM 5 YOU.

09:44AM 6 MR. BOSTIC: MAY I APPROACH, YOUR HONOR?

09:44AM 7 THE COURT: YES. THANK YOU.

09:44AM 8 MR. BOSTIC: (HANDING.)

09:44AM 9 MR. COOPERSMITH: THANK YOU, YOUR HONOR. THAT'S
09:44AM 10 VERY COURTEOUS.

09:44AM 11 SO WHEN YOU -- WHAT THIS EXHIBIT IS IS IN -- AND IT'S
09:44AM 12 5484.

09:44AM 13 SO PATIENT E.T., BACK IN 2014 I BELIEVE IT WAS, SHE HAD AN
09:44AM 14 HIV TEST -- ACTUALLY 2015, MAY 2015, SHE HAD AN HIV TEST, AND
09:44AM 15 THE COURT JUST HEARD SOME INFORMATION ABOUT THAT.

09:44AM 16 AND THEN LAST YEAR, RIGHT BEFORE THE OTHER TRIAL STARTED
09:44AM 17 IN THE SUMMER, SHE WENT AND GOT A TEST AT THIS LABORATORY, THE
09:44AM 18 CONTRA COSTA HEALTH SERVICES LABORATORY. I THINK SHE TESTIFIED
09:45AM 19 THAT THAT WAS AT THE RECOMMENDATION OF AN FBI AGENT.

09:45AM 20 AND SHE WAS -- SHE TESTIFIED THAT SHE WAS TRYING TO GET
09:45AM 21 ANOTHER PIECE OF EVIDENCE FOR THIS CASE.

09:45AM 22 AND THE ISSUE, THOUGH, IS THAT THE THERANOS TEST BACK IN
09:45AM 23 2015 WAS A VENOUS DRAW BLOOD TEST FROM THE ARM RUN ON
09:45AM 24 COMMERCIAL EQUIPMENT, AND THAT LED TO THE VARIOUS TESTS THAT
09:45AM 25 THE COURT HAS JUST HEARD ABOUT FROM MY COLLEAGUE, MR. FLYNN.

09:45AM 1 BUT THEN THIS TEST THAT WE'RE TALKING ABOUT IN 2021, WHICH
09:45AM 2 IS EXHIBIT 5484, IT'S A DIFFERENT TYPE OF TEST, IT'S A CHEEK
09:45AM 3 SWAB TEST, AND IT SAYS WHAT THE EQUIPMENT IS. IT'S ON
09:45AM 4 SOMETHING CALLED THE ALERE, A-L-E-R-E, DETERMINE HIV RAPID TEST
09:45AM 5 KIT.

09:45AM 6 SO IT WAS A CHEEK SWAB TEST, A DIFFERENT TYPE OF TEST.
09:45AM 7 AND THEN IN ADDITION, WHEN YOU LOOK AT THE EXHIBIT,
09:46AM 8 THERE'S A CHECK BOX WITH THE WORD "NEGATIVE" AND THAT'S WHAT
09:46AM 9 SHE WAS, NEGATIVE.

09:46AM 10 AND THEN IT SAYS, NEXT TO THAT, EVIDENCE OF HIV ANTIGEN OR
09:46AM 11 ANTIBODY WERE NOT DETECTED.

09:46AM 12 AND THEN IT SAYS, A NEGATIVE TEST RESULT ONLY REFLECTS THE
09:46AM 13 HIV ANTIGEN/ANTIBODY STATUS ON THE DATE THAT THE SPECIMEN WAS
09:46AM 14 OBTAINED FROM THE ABOVE NAMED PERSON.

09:46AM 15 SO WE HAVE NO CONTEXT HERE. WE HAVE NO EXPERT TESTIMONY.
09:46AM 16 WE HAVE NO PHYSICIAN WHO COULD SAY THAT THE CHEEK SWAB TEST IN
09:46AM 17 2021, YOU KNOW, SOME SIX YEARS LATER AFTER THE THERANOS TEST,
09:46AM 18 IS IN ANY WAY AN APPLES-TO-APPLES COMPARISON, AND WE JUST DON'T
09:46AM 19 KNOW THAT.

09:46AM 20 SO TO LET THE GOVERNMENT INTRODUCE THIS AS A CONFIRMATION
09:46AM 21 THAT THE THERANOS TEST WAS FALSE WE THINK WOULD BE IMPROPER,
09:46AM 22 BECAUSE OUR UNDERSTANDING FROM READING THE DISCOVERY AND THE
09:46AM 23 WITNESS'S TESTIMONY IS SHE CAN'T SAY ANYTHING ABOUT THAT ISSUE.

09:46AM 24 SO WE'RE -- WITHOUT MORE, WITHOUT FOUNDATION, WE DON'T
09:47AM 25 THINK 5484 CAN COME IN. THAT'S THE FIRST ISSUE.

09:47AM 1 THERE'S ANOTHER ISSUE, BUT I CAN PAUSE IF THE COURT WOULD
09:47AM 2 LIKE ME TO.

09:47AM 3 THE COURT: WELL, WHY DON'T YOU TELL US THE SECOND
09:47AM 4 ISSUE?

09:47AM 5 MR. COOPERSMITH: SURE. THE OTHER ISSUE I THINK IS
09:47AM 6 SIMPLER.

09:47AM 7 THERE'S TESTIMONY FROM THIS WITNESS IN THE FIRST TRIAL,
09:47AM 8 AND I JUST WANT TO FLAG IT EXACTLY.

09:47AM 9 SO AT PAGE 6757, 6757, OF THE TRANSCRIPT OF THE TRIAL IN
09:47AM 10 THE HOLMES CASE, THE GOVERNMENT, MR. BOSTIC, ASKED A QUESTION
09:47AM 11 ON LINE 18: "QUESTION, BASED ON YOUR MEDICAL HISTORY, ARE YOU
09:47AM 12 AWARE OF ANY REASON WHY HIV ANTIBODIES WOULD BE PRESENT IN YOUR
09:47AM 13 BLOOD?"

09:47AM 14 AND HER ANSWER WAS "NO."

09:47AM 15 RIGHT?

09:47AM 16 WHEN YOU LOOK AT THE DISCOVERY, THERE IS A REASON. AND WE
09:47AM 17 HAVE THAT FROM DR. ASIN'S DISCOVERY AND HER DISCOVERY. SHE
09:47AM 18 CHOSE TO GET THIS TEST, AND THERE'S A REASON.

09:48AM 19 AND I DON'T WANT TO GET INTO, IN CROSS-EXAMINATION, YOU
09:48AM 20 KNOW, HER PRIVATE LIFE OR HER PARTNERS OR ANYTHING LIKE THAT.
09:48AM 21 I THINK THAT'S NOT REALLY SOMETHING THAT WOULD BE APPROPRIATE
09:48AM 22 IN THIS COURT.

09:48AM 23 BUT BECAUSE THE GOVERNMENT LACKS A FOUNDATION FOR THE
09:48AM 24 QUESTION, WE DON'T THINK THEY SHOULD BE ALLOWED TO ASK A
09:48AM 25 QUESTION ABOUT WHETHER -- IS THERE ANY REASON WHY, YOU KNOW,

09:48AM 1 YOU WOULD WANT TO GET AN HIV TEST, OR IS THERE ANY REASON WHY
09:48AM 2 YOU WOULD HAVE THESE ANTIBODIES IN YOUR BLOOD, AND SHE WOULD
09:48AM 3 SAY NO?

09:48AM 4 WE HAVE -- THERE IS NO FOUNDATION FOR THE QUESTION.

09:48AM 5 AND IN ORDER TO REALLY UNPACK THAT, WE WOULD HAVE TO GET
09:48AM 6 INTO THINGS I DON'T THINK ANYONE REALLY WANTS TO DO, WHICH IS
09:48AM 7 TO EXPLORE WHY WOULD THIS PERSON IN 2015 WANT TO CHOOSE TO GET
09:48AM 8 AN HIV TEST?

09:48AM 9 I DON'T WANT TO PRY INTO HER PRIVATE LIFE, BUT THAT'S THE
09:48AM 10 PROBLEM WITH THE QUESTION, IT JUST LACKS FOUNDATION.

09:48AM 11 THE COURT: YOU SAID WE WOULD HAVE TO.

09:48AM 12 MR. COOPERSMITH: WELL, I MEAN HAVE TO.

09:48AM 13 I DON'T THINK I WOULD DO IT, RIGHT, BECAUSE I DON'T THINK
09:49AM 14 IT'S HELPFUL. I DON'T THINK IT'S -- IT'S EMBARRASSING FOR THE
09:49AM 15 WITNESS. I JUST DON'T WANT TO --

09:49AM 16 THE COURT: IT'S POTENTIALLY DANGEROUS.

09:49AM 17 MR. COOPERSMITH: WHAT?

09:49AM 18 THE COURT: IT'S POTENTIALLY DANGEROUS.

09:49AM 19 MR. COOPERSMITH: SURE, YOUR HONOR. ALL OF THAT.

09:49AM 20 I JUST DON'T THINK THAT IT'S SOMETHING THAT I WANT TO --
09:49AM 21 IT'S SOMETHING THAT -- MY GOAL IS NOT TO EMBARRASS A PERSON ON
09:49AM 22 THE WITNESS STAND.

09:49AM 23 THE PROBLEM, THOUGH, ARISES NOT FROM THAT, IT ARISES FROM
09:49AM 24 THE QUESTION, WHICH, AGAIN, DOESN'T HAVE A FOUNDATION, BECAUSE
09:49AM 25 MR. BOSTIC KNOWS, JUST LIKE I KNOW FROM READING THE SAME

09:49AM 1 INTERVIEW MEMOS AND TESTIMONY, THAT THERE WAS A REASON, RIGHT,
09:49AM 2 THAT SHE CHOSE TO GET THIS TEST.

09:49AM 3 SO THAT'S OUR POSITION ON THAT PARTICULAR POINT.

09:49AM 4 THE COURT: OKAY.

09:49AM 5 MR. BOSTIC.

09:49AM 6 MR. BOSTIC: LET ME RESPOND, IF I COULD, TO THE
09:49AM 7 SECOND POINT FIRST BECAUSE THAT'S WHAT IS ON MY MIND.

09:49AM 8 THE COURT: SURE.

09:49AM 9 MR. BOSTIC: MR. COOPERSMITH JUST PRESENTED TWO
09:49AM 10 VERSIONS OF GOVERNMENT QUESTIONS TO THE COURT WHICH WERE VERY
09:49AM 11 DIFFERENT FROM EACH OTHER.

09:49AM 12 HE READ IN THE TRANSCRIPT A QUESTION ABOUT WHETHER THIS
09:49AM 13 WITNESS WOULD BE AWARE OF ANY REASON WHY HIV ANTIBODIES WOULD
09:50AM 14 BE PRESENT IN HER SYSTEM.

09:50AM 15 THAT QUESTION, I BELIEVE, WAS ASKED AFTER THE POSITIVE
09:50AM 16 RESULT HAD BEEN INTRODUCED INTO EVIDENCE.

09:50AM 17 MR. COOPERSMITH THEN BLENDED THAT INTO A DISCUSSION ABOUT
09:50AM 18 THE REASON FOR THE WITNESS GETTING THE HIV TEST IN THE FIRST
09:50AM 19 PLACE. THAT'S A VERY DIFFERENT THING.

09:50AM 20 SO THOSE TWO QUESTIONS ARE NOT THE SAME, THE QUESTION OF
09:50AM 21 CAN YOU EXPLAIN THIS POSITIVE RESULT VERSUS WHY DID YOU SEEK
09:50AM 22 THE TESTING IN THE FIRST PLACE ARE TWO ABSOLUTELY DIFFERENT
09:50AM 23 THINGS.

09:50AM 24 AS TO THAT SECOND POINT, THE REASON FOR GETTING THE TEST,
09:50AM 25 I DON'T THINK IT'S RELEVANT TO THE WITNESS'S TESTIMONY, I DON'T

09:50AM 1 THINK THE JURY NEEDS TO HEAR ABOUT IT. I THINK IT SHOULD BE
09:50AM 2 EXCLUDABLE UNDER 403 IF THE DEFENSE INTENDED TO COVER IT, AND
09:50AM 3 I'M SOMEWHAT DISTURBED THAT WE'RE EVEN DISCUSSING IT IN OBLIQUE
09:50AM 4 TERMS ON THE OPEN RECORD IF I'M HONEST.

09:50AM 5 BUT THAT'S MY POSITION ON THAT.

09:50AM 6 BUT THERE WAS A BASIS FOR THE QUESTION. THE QUESTION WAS,
09:51AM 7 WAS THE WITNESS AWARE OF ANY REASON WHY THIS RESULT MIGHT HAVE
09:51AM 8 BEEN WHAT IT WAS, AND THE ANSWER WAS A SIMPLE NO, AND SO I
09:51AM 9 THINK THAT'S RELEVANT.

09:51AM 10 I CAN MOVE ON TO THE FIRST POINT OR WE CAN STAY ON THIS.

09:51AM 11 THE COURT: SURE. GO AHEAD.

09:51AM 12 MR. BOSTIC: ON THE FIRST POINT, YOUR HONOR, SO AT
09:51AM 13 VARIOUS TIMES THROUGHOUT THE TRIAL THERE HAS BEEN EVIDENCE OF
09:51AM 14 TESTING THAT HAS BEEN CONDUCTED OUTSIDE OF THERANOS, TESTING
09:51AM 15 CONDUCTED BY CONVENTIONAL LABS, TESTS THAT THE WITNESSES WERE
09:51AM 16 AWARE OF.

09:51AM 17 THE DEFENSE HAS ALSO ELICITED TESTIMONY FROM WITNESSES
09:51AM 18 ABOUT OTHER TESTING THAT THEY HAD DONE AROUND THE SAME TIME AS
09:51AM 19 THE THERANOS TESTS.

09:51AM 20 I DON'T THINK THAT IN ANY OF THOSE CASES THERE HAS BEEN AN
09:51AM 21 ANALYSIS OF THE METHODS USED BY THAT OUTSIDE LAB OR WHETHER
09:51AM 22 THEY SUFFICIENTLY MATCHED UP TO THE THERANOS METHODS. IT'S
09:51AM 23 BEEN ENOUGH THAT THOSE TESTS WERE TESTING FOR THE SAME THING.

09:51AM 24 THAT'S TRUE FOR THESE HIV TESTS AS WELL. THEY MAY USE
09:52AM 25 DIFFERENT METHODS TO TEST FOR THE SAME THING, BUT THEY BOTH

09:52AM 1 TEST FOR THE PRESENCE OF HIV ANTIGENS OR ANTIBODIES.

09:52AM 2 AND THE FACTS THAT THOSE ANTIGENS WERE NOT DETECTED IN
09:52AM 3 2021 IS CERTAINLY PROBATIVE OF WHETHER OR NOT THE THERANOS TEST
09:52AM 4 WAS ACCURATE WHEN IT SAID THAT THEY WERE PRESENT IN 2015.

09:52AM 5 AND I THINK, IF NECESSARY, THE COURT COULD TAKE JUDICIAL
09:52AM 6 NOTICE OF THE FACT THAT THERE IS, GENERALLY SPEAKING, NO CURE
09:52AM 7 FOR HIV, AND THAT ONCE SOMEONE HAS CONTRACTED THAT ILLNESS, IT
09:52AM 8 STAYS PRESENT IN THEIR SYSTEM.

09:52AM 9 SO I THINK MR. COOPERSMITH'S OBJECTION ABOUT WHETHER THIS
09:52AM 10 IS A PERFECT APPLES-TO-APPLES COMPARISON GOES TO WEIGHT RATHER
09:52AM 11 THAN ADMISSIBILITY.

09:52AM 12 I'M HAPPY TO ANSWER ANY OTHER QUESTIONS THAT THE COURT
09:52AM 13 MIGHT HAVE.

09:52AM 14 THE COURT: THANK YOU.

09:52AM 15 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

09:52AM 16 I THINK ON THAT POINT, WITH REGARD TO EXHIBIT 5484, IT'S
09:52AM 17 ESSENTIALLY A 702 PROBLEM, RIGHT, BECAUSE THE WITNESS CAN'T
09:53AM 18 SAY, BECAUSE MY UNDERSTANDING IS THAT SHE DOESN'T KNOW, SHE'S
09:53AM 19 NOT A PHYSICIAN OR A SCIENTIST, THAT IT IS AN APPROPRIATE
09:53AM 20 COMPARISON WITH THE TEST FROM FIVE YEARS EARLIER.

09:53AM 21 AND SHE -- SO THERE'S NO, THERE'S NO CONTEXT, THERE'S NO
09:53AM 22 BASIS FOR PUTTING IT IN.

09:53AM 23 AND SHE IS, LIKE, AN ACTUAL COUNT OF THIS INDICTMENT WHERE
09:53AM 24 THE GOVERNMENT IS TRYING TO USE THIS TEST AS AFFIRMATIVE
09:53AM 25 EVIDENCE THAT -- OF THE ELEMENT OF FALSITY IN THE WIRE FRAUD

09:53AM 1 CHARGE THAT SHE'S THE SUBJECT OF.

09:53AM 2 SO I THINK IN THAT SITUATION, THE GOVERNMENT REALLY CAN'T
09:53AM 3 JUST PUT IN A TEST AND, WITH NO BASIS WHERE THE WITNESS CAN'T
09:53AM 4 SAY ANYTHING OTHER THAN, WELL, SHE -- I THINK SHE COULD SAY IT
09:53AM 5 WAS A DIFFERENT TEST. SHE TESTIFIED BEFORE IT WAS A CHEEK SWAB
09:53AM 6 TEST, AND WE KNOW THAT.

09:53AM 7 BUT WE DON'T KNOW ANYTHING ABOUT WHAT THIS TEST WAS AND
09:53AM 8 HOW IT MIGHT COMPARE, OR NOT, TO THE THERANOS TEST.

09:53AM 9 AND I THINK THAT'S A PROBLEM, SO ESSENTIALLY A 702
09:53AM 10 PROBLEM.

09:53AM 11 THE COURT: ANYTHING FURTHER ON THE 702 ISSUE?

09:54AM 12 MR. BOSTIC: NO, YOUR HONOR, ONLY TO SAY THAT THIS
09:54AM 13 IS -- WE'RE NOT SEEKING EXPERT TESTIMONY FROM THIS WITNESS.

09:54AM 14 THE LAB RESULTS SPEAK FOR THEMSELVES. ONE SAYS POSITIVE,
09:54AM 15 THE OTHER SAYS NEGATIVE.

09:54AM 16 THE DEFENSE CAN ARGUE THAT THAT'S NOT CONCLUSIVE, OR THEY
09:54AM 17 CAN HIGHLIGHT THE DIFFERENCE IN THE METHODS THAT WERE USED.

09:54AM 18 BUT THERE'S NO REASON THAT THE JURY ISN'T EQUIPPED TO
09:54AM 19 WEIGH THAT EVIDENCE AND MAKE A DETERMINATION AS TO WHETHER THE
09:54AM 20 EVIDENCE SUPPORTS THE FINDING THAT THE THERANOS TEST WAS
09:54AM 21 INACCURATE OR NOT.

09:54AM 22 I'LL ALSO JUST NOTE THAT I DON'T BELIEVE IT'S A
09:54AM 23 REQUIREMENT FOR THE GOVERNMENT TO PROVE THAT THESE INDIVIDUAL
09:54AM 24 TEST RESULTS WERE INACCURATE IN ORDER FOR THE JURY TO RETURN A
09:54AM 25 CONVICT ON A COUNT. NOWHERE IN THE ELEMENTS FOR WIRE FRAUD IS

09:54AM 1 IT REQUIRED THAT THE CONTENT OF THE WIRE ACTUALLY CONTAINED
09:54AM 2 FALSE INFORMATION.

09:54AM 3 SO I THINK THAT, THAT IS KIND OF A DISTRACTION AND AN
09:54AM 4 ARGUMENT THAT DOESN'T REALLY MAKE A DIFFERENCE TO THE
09:55AM 5 ADMISSIBILITY OF THIS EVIDENCE.

09:55AM 6 MR. COOPERSMITH: AND ON THAT POINT, YOUR HONOR, SO
09:55AM 7 THE GOVERNMENT IS PRESENTING THIS PARTICULAR PATIENT. SHE IS A
09:55AM 8 COUNT. AND THEY'RE -- IT'S PART OF THEIR EVIDENTIARY
09:55AM 9 PRESENTATION ABOUT FALSITY.

09:55AM 10 THEY'RE USING THIS, WE CALL IT AN ANECDOTE THE COURT MAY
09:55AM 11 REMEMBER, TO SHOW THAT THERE IS SOME PROBLEM WITH THERANOS
09:55AM 12 TESTING, IN THIS CASE COMMERCIAL TESTING, NOT EVEN THERANOS
09:55AM 13 TECHNOLOGY TESTING, AND THAT'S THE REASON FOR THE EVIDENCE, AND
09:55AM 14 THERE'S NO OTHER REASON.

09:55AM 15 SO THIS IS EVIDENCE THAT IS A PART OF THEIR, THEIR
09:55AM 16 BUILDING BLOCKS, YOU KNOW, TO SHOW THAT THERE IS FALSITY HERE
09:55AM 17 AND THERE'S INACCURACY IN THERANOS TESTING, SO THAT'S THE ONLY
09:55AM 18 REASON FOR THE EVIDENCE TO COME IN, I THINK, FROM THE
09:55AM 19 GOVERNMENT'S PERSPECTIVE.

09:55AM 20 THE COURT: OKAY. ALL RIGHT.

09:55AM 21 WELL, THANK YOU. THANK YOU FOR THAT.

09:55AM 22 I LOOK AT THIS AND I DO SEE THAT IT DOES, AS
09:55AM 23 MR. COOPERSMITH SUGGESTS, AND MR. BOSTIC RECOGNIZES, IT WAS A
09:56AM 24 DIFFERENT FORMAT OF COLLECTION OF THE SWAB, A CHEEK SWAB, AND
09:56AM 25 THE WITNESS WOULD TESTIFY ABOUT HER, IN 2021, AUGUST, GETTING

09:56AM 1 THE CHEEK SWAB AND THEN WOULD REPORT ON THE RESULTS.

09:56AM 2 I DO THINK THAT THERE IS SOME RELEVANCE TO THIS. I DON'T
09:56AM 3 SEE IT AS A 702 ISSUE. I DO THINK IT'S REALLY A WEIGHT ISSUE.

09:56AM 4 AND YOU CERTAINLY WOULD HAVE AN OPPORTUNITY TO, IF YOU
09:56AM 5 WISH, MR. COOPERSMITH, YOUR TEAM, TO CALL OUT TO THE JURY
09:56AM 6 THROUGH THIS WITNESS OR OTHERWISE ARGUE THAT IT IS A DIFFERENT
09:56AM 7 TYPE OF TEST, AND THAT THE JURY SHOULDN'T CONSIDER IT FOR THAT
09:56AM 8 REGARD.

09:56AM 9 AND I JUST, I THINK IT'S -- ANY UNFAIR PREJUDICE HERE IS
09:56AM 10 OUTWEIGHED BY THE PROBATIVE VALUE OF THIS.

09:57AM 11 AND THE UNFAIR PREJUDICE IS, I DON'T SEE IT AS A REAL -- I
09:57AM 12 SEE IT AS A WEIGHT ISSUE, REALLY, AND THE JURY CAN ACCEPT IT
09:57AM 13 AND RECOGNIZE, AS YOU POINT OUT, IT'S A DIFFERENT TYPE OF A
09:57AM 14 TEST, AND DO WITH IT AS THEY WILL. I DON'T SEE IT AS A REAL
09:57AM 15 PROBLEM IN THAT REGARD.

09:57AM 16 SO I'LL ALLOW THIS TO COME IN.

09:57AM 17 IN REGARDS TO THE QUESTION AND ASKING, IF THERE IS A
09:57AM 18 QUESTION, DO YOU HAVE ANY SUSPICION WHY YOU THOUGHT YOU HAD HIV
09:57AM 19 OR YOU WOULD REPORT A TEST, THAT'S A VERY, VERY PRECARIOUS
09:57AM 20 QUESTION TO POSE TO SOMEBODY.

09:57AM 21 AND IF YOU WANTED, OR SOMEONE FROM YOUR TEAM WANTED, TO
09:57AM 22 ASK THAT QUESTION, AND IF THERE WERE AN OBJECTION, THEN THE
09:57AM 23 COURT WOULD RULE IN FRONT OF THE JURY AFTER THAT QUESTION IS
09:57AM 24 POSED.

09:57AM 25 MR. COOPERSMITH: RIGHT.

09:57AM 1 JUST TO BE CLEAR, WE'RE NOT PROPOSING THAT WE'RE GOING TO
09:58AM 2 ASK THAT TYPE OF QUESTION OF PATIENT E.T. THAT'S NOT OUR
09:58AM 3 INTENTION.

09:58AM 4 IT'S REALLY THE FLIP SIDE OF THAT, WE THINK, BECAUSE THAT
09:58AM 5 WOULD BE IMPROPER, BUT PERHAPS NECESSARY TO REALLY UNDERSTAND
09:58AM 6 WHAT WAS GOING ON HERE.

09:58AM 7 THE GOVERNMENT SIMPLY SHOULDN'T BE ABLE TO ASK THE SAME
09:58AM 8 QUESTION THAT THEY ASKED IN THE LAST TRIAL WITHOUT OBJECTION,
09:58AM 9 WHICH WAS, "IS THERE ANY REASON THAT THIS PATIENT WOULD BELIEVE
09:58AM 10 THAT THERE WAS ANY REASON TO THINK THAT THERE WOULD EVER BE
09:58AM 11 THESE ANTIBODIES IN HER BLOOD OR IN HER SYSTEM?"

09:58AM 12 AND THAT QUESTION IS WHAT WOULD TRIGGER THE NEED FOR OTHER
09:58AM 13 THINGS. AS I SAID, WE'RE NOT INTENDING TO DO THAT, BUT THAT'S
09:58AM 14 THE CONUNDRUM, RIGHT.

09:58AM 15 THE COURT: WELL, THAT'S WHAT THE QUESTION WOULD BE,
09:58AM 16 "ANY REASON IN YOUR MIND?"

09:58AM 17 AND SHE COULD SAY, "NO, NO REASON IN MY MIND."

09:58AM 18 YOU MIGHT HAVE A DIFFERENT OPINION BASED ON WHAT YOU KNOW
09:58AM 19 OF HER AS TO WHY SHE SHOULD BE CONCERNED ABOUT THAT.

09:59AM 20 BUT SHE'S EXPRESSING WHAT IS IN HER MENTAL IMPRESSION, AND
09:59AM 21 THAT'S WHAT IS RELEVANT, HER MENTAL IMPRESSION, NOT SOMEONE
09:59AM 22 ELSE'S MENTAL IMPRESSION ABOUT, WELL, I THINK YOU SHOULD BE
09:59AM 23 CONCERNED BECAUSE OF WHATEVER ELSE IT IS.

09:59AM 24 SO THAT'S THE -- AND I SUPPOSE, TO GO FURTHER INTO THAT,
09:59AM 25 WELL, ISN'T IT A FACT THAT YOU, X, Y, Z, AND GET INTO PERSONAL

09:59AM 1 LIVES.

09:59AM 2 I THINK THAT'S VERY RISKY AND THAT IS VERY THIN ICE.

09:59AM 3 MR. COOPERSMITH: I AGREE, YOUR HONOR, AND THAT'S
09:59AM 4 WHY WE DON'T INTEND TO DO THAT.

09:59AM 5 THE COURT: WELL, I APPRECIATE THAT. I APPRECIATE
09:59AM 6 THAT RECOGNITION.

09:59AM 7 BUT I THINK THE INQUIRY AS TO HER, FROM HER STATE OF MIND,
09:59AM 8 HER MINDSET, IF THERE'S ANY REASON THAT SHE BELIEVES, THAT'S
09:59AM 9 PART OF HER IMPRESSION, AND I THINK THE WITNESS CAN TESTIFY
09:59AM 10 ABOUT THAT.

09:59AM 11 MR. COOPERSMITH: RIGHT.

09:59AM 12 IT'S JUST THAT BECAUSE WE CAN'T, YOU KNOW, WITH ANY SENSE
09:59AM 13 OF DECORUM, COULD NOT EVER EXPLORE THAT TOPIC, THEN WE'RE SORT
09:59AM 14 OF LEFT OUT WITHOUT ANY REMEDY FOR THE GOVERNMENT'S QUESTION,
10:00AM 15 WHICH IS SHE'S BEING ABLE TO STATE HER VIEW ABOUT THAT ISSUE,
10:00AM 16 BUT THERE'S NO WAY TO EXPLORE THAT BECAUSE IT'S JUST NOT
10:00AM 17 APPROPRIATE, RIGHT?

10:00AM 18 SO I JUST THINK THE FIRST PROBLEM IS SINCE WE KNOW -- THE
10:00AM 19 PROBLEM IS THAT THERE'S NO GOOD FAITH BASIS FOR THE QUESTION,
10:00AM 20 RIGHT? THERE'S NO FOUNDATION.

10:00AM 21 THE GOVERNMENT KNOWS EXACTLY, JUST AS I DO, WHAT THE
10:00AM 22 REASON IS THAT SHE GOT THE TEST IN THE FIRST PLACE.

10:00AM 23 SO THAT'S THE PROBLEM WITH THE WHOLE SITUATION.

10:00AM 24 THE COURT: MR. BOSTIC.

10:00AM 25 MR. BOSTIC: THAT'S NOT WHAT THE QUESTION IS ABOUT

10:00AM 1 THOUGH, YOUR HONOR.

10:00AM 2 I'M NOT SURE HOW ELSE TO SAY IT, BUT THE QUESTION IS
10:00AM 3 ABOUT, LOOKING AT THIS POSITIVE RESULT, DO YOU HAVE AN
10:00AM 4 EXPLANATION FOR WHY THERE MIGHT HAVE BEEN -- AND
10:00AM 5 MR. COOPERSMITH HAS THE TRANSCRIPT -- BUT WHY YOU MIGHT HAVE
10:00AM 6 HAD HIV ANTIBODIES IN YOUR SYSTEM?

10:00AM 7 AND THE ANSWER FROM THE WITNESS WAS, NO. THAT WAS AN
10:00AM 8 HONEST ANSWER, I BELIEVE.

10:00AM 9 THE QUESTION OF WHY SHE SOUGHT THE TEST IN THE FIRST PLACE
10:01AM 10 IS A DIFFERENT QUESTION.

10:01AM 11 AGAIN, IT'S DIFFICULT TO ARGUE THIS IN THE OPEN RECORD
10:01AM 12 BECAUSE I DON'T WANT TO GO INTO THIS WITNESS'S PERSONAL
10:01AM 13 DETAILS, BUT I THINK, ACCORDING TO MR. COOPERSMITH'S THEORY OF
10:01AM 14 THE RELATIONSHIP BETWEEN THOSE TWO QUESTIONS, HE SEEMS TO BE
10:01AM 15 SAYING THAT SOMEONE COULD NOT ANSWER NO TO MY QUESTION IF THEY
10:01AM 16 HAD EVER ENGAGED IN ANY OF THE BEHAVIORS THROUGH WHICH ONE
10:01AM 17 MIGHT ACQUIRE THIS ILLNESS.

10:01AM 18 AND I SIMPLY DON'T AGREE WITH THAT INTERPRETATION.

10:01AM 19 AND I THINK THE DIFFERENCE BETWEEN, YOU KNOW, ESSENTIALLY
10:01AM 20 DID THIS RESULT SURPRISE YOU VERSUS WHY DID YOU SEEK THE TEST
10:01AM 21 IN THE FIRST PLACE ARE TWO VERY DIFFERENT QUESTIONS.

10:01AM 22 MR. COOPERSMITH: NOTHING FURTHER, YOUR HONOR.

10:01AM 23 THE COURT: ALL RIGHT. THANK YOU.

10:01AM 24 I THINK THE QUESTION FROM THE GOVERNMENT, AS POSED, IS NOT
10:01AM 25 INAPPROPRIATE, AND ANY FOLLOWUP ON THAT, I THINK YOU RECOGNIZE

10:02AM 1 OUR CONVERSATION, MR. COOPERSMITH.

10:02AM 2 MR. COOPERSMITH: YES, YOUR HONOR.

10:02AM 3 THE COURT: OKAY. ALL RIGHT. THANK YOU.

10:02AM 4 MR. COOPERSMITH: THANK YOU.

10:02AM 5 MR. BOSTIC: THANK YOU, YOUR HONOR.

10:02AM 6 THE COURT: ANYTHING ELSE WE SHOULD DISCUSS THIS
10:02AM 7 MORNING?

10:02AM 8 MR. COOPERSMITH: WE HAVE NOTHING FURTHER AT THIS
10:02AM 9 TIME.

10:02AM 10 THE COURT: OKAY.

10:02AM 11 MR. BOSTIC: NOTHING FROM THE GOVERNMENT.

10:02AM 12 THANK YOU, YOUR HONOR.

10:02AM 13 THE COURT: ALL RIGHT. THANK YOU.

10:02AM 14 WE'VE -- COUNSEL HAVE SHARED WITH ME A PROPOSED SCHEDULE,
10:02AM 15 AND BASED ON THAT, MY SENSE IS THAT IT'S MY HOPE, AND I THINK
10:02AM 16 COUNSEL HAVE CONFIRMED THIS, THAT WE SHOULD BE ABLE TO COMPLETE
10:02AM 17 THE WITNESSES WHO WERE SCHEDULED TO TESTIFY TODAY, WE SHOULD BE
10:02AM 18 ABLE TO COMPLETE THEIR TESTIMONY IN TOTO TOMORROW WITH A FULL
10:02AM 19 DAY'S EXAMINATION.

10:02AM 20 IS THAT YOUR THOUGHT, MR. SCHENK?

10:02AM 21 MR. SCHENK: THANK YOU, YOUR HONOR.

10:02AM 22 YES, I THINK THAT THAT IS CORRECT. THE GOVERNMENT NEEDS
10:02AM 23 TO HAVE SOME CONVERSATIONS WITH AT LEAST ONE WITNESS WHO WAS
10:03AM 24 SCHEDULED TO TESTIFY TODAY REGARDING AVAILABILITY TOMORROW, BUT
10:03AM 25 PRESUMING THAT WORKS OUT OKAY, IT IS THE GOVERNMENT'S BELIEF

10:03AM 1 THAT THE WITNESSES WE HAVE LINED UP FOR TODAY WILL FILL ONE
10:03AM 2 DAY, BUT CAN BE COMPLETED WITHIN ONE DAY.

10:03AM 3 AND IF WE MOVE ALL OF THEM UNTIL WEDNESDAY, UNTIL
10:03AM 4 TOMORROW, WE SHOULD BE ABLE TO SIMPLY COMPLETE THE TESTIMONY
10:03AM 5 TOMORROW.

10:03AM 6 THE COURT: OKAY. THANK YOU.

10:03AM 7 AND THEN YOU WOULD HAVE ANOTHER WITNESS, PERHAPS A FINAL
10:03AM 8 WITNESS FOR FRIDAY?

10:03AM 9 MR. SCHENK: YES, YOUR HONOR.

10:03AM 10 THE COURT: ALL RIGHT. THANK YOU.

10:03AM 11 MR. COOPERSMITH.

10:03AM 12 MR. COOPERSMITH: YES, YOUR HONOR.

10:03AM 13 BASED ON WHAT I KNOW RIGHT NOW, I BELIEVE THAT WE WILL
10:03AM 14 FINISH THE WITNESSES, ASSUMING THEY'RE GOING TO COME ON THE
10:03AM 15 STAND TOMORROW. I THINK THERE ARE FIVE WITNESSES. EVEN THOUGH
10:03AM 16 IT'S A LOT OF WITNESSES, I THINK WE CAN FINISH TOMORROW.

10:03AM 17 OBVIOUSLY THERE'S ALWAYS UNKNOWNNS THAT HAPPEN. BUT THAT
10:03AM 18 IS OUR INTENTION, AND WE THINK THAT IS VERY DOABLE.

10:03AM 19 THE COURT: OKAY. GREAT. WELL, THANK YOU FOR THAT.
10:03AM 20 I APPRECIATE THAT.

10:03AM 21 WE'RE LOSING A DAY TODAY BECAUSE OF A JUROR'S ILLNESS. I
10:04AM 22 APPRECIATE COUNSEL'S UNDERSTANDING THAT WE'RE GOING TO ADJOURN
10:04AM 23 FOR THE DAY.

10:04AM 24 I AM CONCERNED ABOUT THE SCHEDULE. I UNDERSTAND THAT
10:04AM 25 WE'RE MOVING ALONG AND WE MIGHT BE INTO THE DEFENSE CASE SOON.

10:04AM 1 WE STILL HAVE SOME WORK TO DO ON SOME OTHER PRELIMINARY
10:04AM 2 MATTERS, THOUGH. AND IF WE HAVE TIME FRIDAY, MAYBE WE'LL
10:04AM 3 DISCUSS SOME OF THOSE. I'LL GIVE THE DEFENSE SOME TIME TO
10:04AM 4 DIGEST THE COURT'S DECISIONS AND SEE WHERE WE GO.

10:04AM 5 BUT I APPRECIATE THAT -- THE RECOGNITION THAT,
10:04AM 6 MR. COOPERSMITH, YOUR TEAM IS GOING TO DO EVERYTHING YOU CAN TO
10:04AM 7 COMPLETE ALL OF THE EXAMINATION OF THESE WITNESSES.

10:04AM 8 MR. COOPERSMITH: THAT IS OUR INTENT, YOUR HONOR.

10:04AM 9 THE COURT: SO THEY'RE OUT OF TOWN. SOME OF THEM
10:04AM 10 ARE OUT OF TOWN.

10:04AM 11 THAT WOULD BE HELPFUL.

10:04AM 12 MR. SCHENK: YES, THAT IS CORRECT. THANK YOU.

10:04AM 13 THE COURT: OKAY. GREAT. THANK YOU VERY MUCH.

10:04AM 14 MR. SCHENK: YOUR HONOR, THANK YOU FOR THE
10:04AM 15 DISCUSSION THIS MORNING REGARDING THE DECISION TO GO DARK OR
10:04AM 16 NOT GO DARK TODAY. I CAN'T RECALL IF THE COURT --

10:04AM 17 THE COURT: YES. WELL, WE DID HAVE A DISCUSSION. I
10:05AM 18 MET WITH COUNSEL THIS MORNING TO DISCUSS THIS MATTER.

10:05AM 19 IT WAS BROUGHT TO MY ATTENTION EARLY THIS MORNING,
10:05AM 20 ACTUALLY LAST NIGHT, AND I EXCHANGED COMMUNICATION WITH OUR
10:05AM 21 STAFF LAST NIGHT, 10:00, 11:00 O'CLOCK, WE WERE MONITORING THIS
10:05AM 22 JUROR'S CONDITION. AND I WANTED TO SHARE THAT WITH YOU THIS
10:05AM 23 MORNING AS EARLY AS POSSIBLE.

10:05AM 24 I DID MEET WITH BOTH COUNSEL TO DISCUSS THIS AND GET YOUR
10:05AM 25 THOUGHTS ABOUT IT, AND IT WAS JUST PROCEDURAL. IT WAS NOT

10:05AM 1 SUBSTANTIVE AT ALL.

10:05AM 2 DO YOU AGREE WITH THAT DESCRIPTION OF THE CONVERSATION?

10:05AM 3 MR. SCHENK: YES, I DO. THANK YOU.

10:05AM 4 MR. COOPERSMITH: YES, YOUR HONOR.

10:05AM 5 THE COURT: RIGHT. AND WE WERE DISCUSSING
10:05AM 6 SCHEDULING. THE PARTIES MET.

10:05AM 7 I BELIEVE IT'S FAIR FOR ME TO SAY THE GOVERNMENT'S DESIRE
10:05AM 8 WAS TO PROCEED TODAY, THIS MORNING, TO EXCUSE THE JUROR.

10:05AM 9 WE HAVE THREE ALTERNATES LEFT, FOUR ALTERNATES LEFT, AND
10:05AM 10 TO PROCEED.

10:05AM 11 MR. COOPERSMITH, I THINK YOUR PREFERENCE WAS TO EXCUSE THE
10:06AM 12 JUROR -- OR, EXCUSE ME, TO GO DARK FOR THE DAY AND -- ALLOW THE
10:06AM 13 JUROR TO PARTICIPATE AND GO DARK TODAY TO ALLOW THAT TO HAPPEN.
10:06AM 14 THAT WAS YOUR POSITION.

10:06AM 15 MR. COOPERSMITH: THAT'S CORRECT, YOUR HONOR.

10:06AM 16 THE COURT: YOU KNOW THE COURT'S DECISION, OF
10:06AM 17 COURSE. WE'RE GOING DARK TODAY AS THE DEFENSE REQUESTED. AND
10:06AM 18 THE COURT BENEFITTED FROM YOUR COMMENTS ABOUT THAT. AND THAT
10:06AM 19 INFORMED THE COURT, SO IT MADE ITS DECISION.

10:06AM 20 AND THAT'S WHY I'M HAVING THIS DISCUSSION ABOUT
10:06AM 21 SCHEDULING, BECAUSE WE LOST A DAY. OUR CONVERSATION INCLUDED
10:06AM 22 SCHEDULING, AND I APPRECIATE YOUR RECOGNITION THAT WE WILL
10:06AM 23 ACCOMPLISH THE EXAMINATION OF ALL OF THESE WITNESSES TOMORROW
10:06AM 24 SUCH THAT THERE'S NO DISRUPTION, SIGNIFICANT DISRUPTION OF THE
10:06AM 25 TIMING OF THE TRIAL.

10:06AM 1 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:06AM 2 THE COURT: OKAY.

10:06AM 3 MR. COOPERSMITH: THE ONLY OTHER THING I SHOULD

10:06AM 4 QUICKLY MENTION, AND I'M NOT SURE THIS IS IN YOUR HONOR'S MIND,

10:06AM 5 BUT IF YOU DO HAVE ANY OTHER QUESTIONS ABOUT THE PENDING MOTION

10:06AM 6 ON THE LABORATORY INFORMATION SYSTEM, WE CERTAINLY ARE PREPARED

10:06AM 7 AT ANY TIME AT THE COURT'S CONVENIENCE TO ANSWER THOSE OR

10:07AM 8 RESPOND TO THOSE.

10:07AM 9 THE COURT: OKAY. GREAT. ALL RIGHT.

10:07AM 10 THANK YOU VERY MUCH.

10:07AM 11 MR. COOPERSMITH: THANK YOU.

10:07AM 12 THE COURT: THANK YOU.

10:07AM 13 (COURT ADJOURNED AT 10:07 A.M.)

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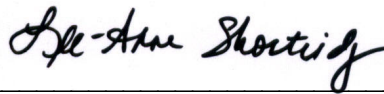
CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8076



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: MAY 17, 2022